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# CONTRADICTORY GOVERNMENT ACTION: ESTOPPEL OF STATUTORY AUTHORITIES

By PATRICK McDONALD\*

## I. INTRODUCTION

Kenneth Culp Davis notes the privileged position of the state in relation to a basic principle of justice:

Although the courts have developed a doctrine of equitable estoppel, under which one who makes a representation to another who reasonably relies to his detriment is estopped to deny the truth of the representation or to gain by taking a position inconsistent with the representation, the courts built up a large body of law that the doctrine of equitable estoppel does not apply to the government . . . .<sup>1</sup>

In Canada, this special immunity is often considered one of the mysterious attributes of the Crown. It is said that "the King is not bound by estoppels, though he can take advantage of them."<sup>2</sup>

The result is often apparent injustice. In *Gibbon v. The Queen*, for example, a taxpayer was erroneously allowed certain deductions for two successive years.<sup>3</sup> Had he known that the deductions were not allowable, he might have availed himself of other legitimate deductions under the *Income Tax Act*. That circumstance was held to create no estoppel preventing the Minister of National Revenue from reassessing the taxpayer on the basis of the higher tax that ought to have been paid. We can hope to find something more to commend that result than the bare affirmation that the Crown cannot be estopped.

There are cases in which the courts have resisted inconsistency in the conduct of government business. In some of these, the courts find some basis other than estoppel to achieve that result. In others, and in the decisions of Lord Denning in particular, the application of estoppel against the Crown is expressly acknowledged. These latter cases have been accounted for as "exceptions of indeterminate scope"<sup>4</sup> or as evidence simply of a conflict in the authorities.<sup>5</sup>

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<sup>1</sup> *Administrative Law* (3d ed. St. Paul, Minn.: West, 1972) at 343.

<sup>2</sup> *R. v. Royal Bank of Can.* (1920), 50 D.L.R. 293 at 304, [1920] 1 W.W.R. 198 at 209 (Man. C.A.), quoting from Everest and Strode, *Law of Estoppel* (3d ed. London: Stevens, 1923).

<sup>3</sup> (1977), 77 D.L.R. (3d) 733, 77 D.T.C. 5193, [1977] C.T.C. 333 (F.C.T.D.).

<sup>4</sup> De Smith, *Judicial Review of Administrative Action*, (3d ed. London: Stevens, 1973) at 90.

<sup>5</sup> E.g., *Gillies Bros. v. The King*, [1947] Ex. C.R. 210, [1947] 2 D.L.R. 769.

I think that something more satisfactory can be said. It requires, however, a restatement of the basic premise. The rule is simply that estoppel cannot be used to defeat the operation of legislation. Whatever freedom the government enjoys to contradict itself may be considered a product of the very principle that limits the freedom of executive action. That principle is the subordination of executive to legislative authority. Where legislation is not involved, the Crown as a legal person is subject to the principle of estoppel.<sup>6</sup>

## II. AUTHORITATIVE POWERS OF DECISION

The key to understanding the scope for estoppel in the context of legislation lies in a distinction that is sometimes used to explain the basic nature of the administrative process.<sup>7</sup> Statutes create rights and obligations in two different ways. The statute may speak for itself, and define in absolute terms what shall or shall not be done, or what shall be the legal consequence of particular conduct.<sup>8</sup> Or the statute may define rights and obligations in terms of the determinations of government officials. In the second instance, legal relations are fixed by the determinations of the official. He enjoys what may be called an authoritative power of decision. Mr. Justice Rand, dealing with another sort of problem altogether, has expressed the point by saying that sometimes the award or adjudication of an official is a "constituent element" in the rights created by legislation.<sup>9</sup>

No estoppel can arise out of the acts of an official who enjoys no authoritative power of decision in relation to the rights and obligations in question. Why should this be so? The answer is the supremacy of legislation. *Ex hypothesi*, legal relations arising from legislation are independent of official action. Consequently, nothing can be made to hinge on the conduct of officials without disturbing the legal consequences called for by the statute. It really has nothing to do with any privileged position of the Crown.

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<sup>6</sup> In 1907 three judges of the Supreme Court of Canada said that estoppel could not be invoked against the Crown in a case involving forged cheques drawn on an account of the Government of Canada: *The Bank of Montreal v. The King* (1907), 38 S.C.R. 258 *per* Davies, Idington and Duff JJ. The weight of modern authority is, however, to the contrary: *Queen Victoria Niagara Falls Park Comm'rs v. International Ry. Co.* (1928-29), 63 O.L.R. 49 (C.A.); *A.G. to the Prince of Wales v. Collom*, [1916] 2 K.B. 193 at 204. See also Farrer, *A Prerogative Fallacy — "That the Crown is not Bound by Estoppel"* (1933), 49 L.Q.R. 511. In *Robertson v. Min. of Pensions*, [1949] K.B. 227 at 231, [1948] 2 All E.R. 767 at 770, Lord Denning said that the notion of Crown immunity from estoppel has long since been exploded. In *St. Ann's Island Shooting and Fishing Club Ltd. v. The King*, [1950] S.C.R. 211, [1950] 2 D.L.R. 225, Rand J. said that the Crown could not be estopped from challenging a lease. This was not because the Crown was immune but because "there can be no estoppel in the face of an express provision of a statute" (at 232). Most of the cases in which it is said that the Crown cannot be estopped involve the Crown in its capacity as a statutory authority and hence the subordination of executive action to the terms of legislation.

<sup>7</sup> See Dickinson, *Administrative Justice and the Supremacy of Law in the United States* (New York: Russell & Russell, 1959), chap. 1.

<sup>8</sup> It is then for the courts to resolve disputes arising under the legislation.

<sup>9</sup> *A. E. Dupont v. Inglis*, [1958] S.C.R. 535, involving section 96 of the *British North America Act*, 1867, 30 & 31 Vict., c. 3 (as amended) (U.K.).

The clearest sort of case arises where the government official has no power of decision at all. In *Millet v. The Queen*, the plaintiff's husband entered into a contract of insurance with the Crown under the *Veterans' Insurance Act*.<sup>10</sup> Regulations under the Act provided that the policy should be void in the event of late payment of premiums. The husband made two late payments and these were accepted by agents of the Crown administering the Act. The last payment before his death was also late, and the Crown relied on this to avoid the policy. The Exchequer Court held that the Crown could not be estopped by the actions of its officials from insisting on strict compliance with regulations enacted pursuant to statute.<sup>11</sup> In a similar case, regulations provided that supplementary death benefits should not be payable to any government employee who elected in prescribed form not to be included in the plan. Although payroll personnel had made salary deductions for an employee who had made the election, the Crown was not estopped from invoking the regulations.<sup>12</sup>

The officials who received premiums and made salary deductions were not authorized to determine whether the conditions precedent to insurance and death benefit payments, respectively, had been satisfied. Accordingly, rights were not affected by their actions. To estop the Crown would be to treat the regulations as if they had not been enacted. It is for that reason, and not because the Crown occupies some special position, that estoppel could not operate.<sup>13</sup> Where a private person acts as though the conditions precedent to some statutory right have been satisfied, he is not estopped from invoking the provisions of the statute to deny that the right exists.<sup>14</sup> *The Municipal Council of Peterborough and Victoria v. Grand Trunk Railway* is an example.<sup>15</sup> Legislation provided for repayment in shares of loans made by any shareholder for the preliminary expenses of a railway company. The plaintiff municipality made advances to the company, but took no shares. It sought repayment and said that the defendant railway was estopped from saying that the statutory provisions for repayment had not been satisfied.

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<sup>10</sup> [1954] Ex. C.R. 562.

<sup>11</sup> Fournier J. said, *id.* at 572: "In my view, where a particular obligation or duty is imposed by statute or by regulations validly made thereunder and embodied in a contract no estoppel should be allowed to give relief from the said obligation."

<sup>12</sup> *Gamble v. The Queen*, [1960] Ex. C.R. 138.

<sup>13</sup> See also *A.G. Can. v. C. C. Fields & Co.*, [1943] O.R. 120, [1943] 2 D.T.C. 622, [1943] C.T.C. 222 (H.C.); *CPR v. The King*, [1931] A.C. 414, [1931] All E.R. Rep. 113, [1931] 2 D.L.R. 386 (P.C.); *City of Toronto v. Toronto Ry. Co.* (1918), 46 D.L.R. 435 (Ont. C.A.). In this last case, the railway and the city entered into a contract purporting to implement their respective obligations under statute. The railway complied with the agreement, but the city asserted that the agreement did not properly reflect the obligations of the railway under the statute and commenced an action based on the terms of the legislation. The Court said (at 443): "Of course nothing in the way of estoppel can be claimed against the city—it cannot legally violate a statute, or give permission to violate a statute: any contract purporting to give such permission is merely void and does not create an estoppel."

<sup>14</sup> Bower, *The Law Relating to Estoppel by Representation*, ed. Turner (2d ed. London: Butterworths, 1966) at 131-34.

<sup>15</sup> (1859), 18 U.C.Q.B. 220.

The court said simply that "the doctrine of estoppel can never interfere with the proper carrying out of the provision of acts of parliament."<sup>16</sup>

The situation appears to be different where the conduct relied on is that of a government official exercising some decision-making power under the statute. In such a case, he is not in the same position as a private person. His decisions are not extraneous to the statutory rights and obligations that are to be implemented. Yet the question remains whether the legal consequences in question are fixed entirely by his determinations. He may exercise a statutory power of decision that is not authoritative because it does not exhaust the operative effect of the statute.

This was the situation in *City of Halifax v. Wonnacott*.<sup>17</sup> The defendant property owner applied for and obtained from the City's building inspector a permit to carry out repairs to a garage. The repairs as executed made the garage a commercial use of the property. The City commenced proceedings for removal of the building on the ground, *inter alia*, that section 815 of the *City Charter* expressly prohibited the use of land in a residential district for commercial purposes. The defendant argued that issuance of the permit created an estoppel. However, issuance of the permit could not rob section 815 of its independent effect. The statute certainly required official approval of construction, but it required something else as well, namely, that commercial developments not be constructed in residential districts. Because section 815 was expressed in absolute terms and not merely as a condition governing the issuance of permits, the action of the building inspector was not an authoritative determination that the provisions of the statute had been satisfied. The same reasoning was applied in *Cam Gard Supply Ltd. v. MNR*.<sup>18</sup> The *Income Tax Act* provides for a deduction from income of payments made for a particular purpose to a pension fund, where the payment is approved by the Minister. The Minister approved a payment, but the taxpayer was subsequently reassessed and the deduction disallowed. Addressing the argument that the Minister's approval could not be withdrawn, Thurlow J. said:

Where a statutory requirement for the deduction has not been met, the deduction for that reason must be disallowed and it does not matter that the approval of the payment, which is another of the essential conditions of deductibility, had been given.<sup>19</sup>

In other words, the approval of the Minister was not the means chosen by

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<sup>16</sup> *Id.* at 224. *Maritime Electric Co. v. General Dairies, Ltd.*, [1937] A.C. 610, a decision of the Privy Council on a Canadian appeal, illustrates the same point. *The Public Utilities Act* of New Brunswick provided that public utility companies were to receive the rates specified in schedules to the Act, nothing more and nothing less. A consumer who had mistakenly been charged less than the specified amounts argued that the utility company was estoppel from claiming more. The Privy Council said that estoppel cannot avail "to release the plaintiff from an obligation to obey such a statute, nor can it enable the defendant to escape from a statutory obligation of such kind on his part" (at 620).

<sup>17</sup> [1951] 2 D.L.R. 488 (N.S.S.C.).

<sup>18</sup> [1974] 2 F.C. 236, 74 D.T.C. 6429, [1974] C.T.C. 487.

<sup>19</sup> *Id.* at 240 (F.C.).

the legislature for determining whether the essential conditions of deductibility had been met. It was merely an added requirement.<sup>20</sup>

Statutory powers that are essentially of a police or enforcement nature often appear to give to the official the power to determine what is required by legislation. Under the *Income Tax Act*,<sup>21</sup> for example, the Minister is required to assess the tax for the taxation year and the interest and penalties, if any, payable. But the taxpayer's duty is to pay the amount prescribed by the statute, and not merely to pay the amount assessed by the Minister. The provisions for filing of returns and for review and assessment by the Minister constitute the process for enforcement of the obligation to pay. If there were any doubt on the matter, it is dispelled by section 152(3), which provides:

Liability for the tax under this Part [Part I - Income Tax] is not affected by an incorrect or incomplete assessment or by the fact that no assessment has been made.

Liability is independent of the administrative process of enforcement. Consequently, the duty to pay tax cannot be affected by the determinations of the Minister or his subordinates. In *Woon v. MNR*, the taxpayer received an "unequivocal ruling" from the Commissioner of Income Tax that tax would not be payable on a particular scheme of property distribution.<sup>22</sup> This could not work any estoppel against the Commissioner or Minister in the face of a statutory provision requiring the distributed property to be included in income as dividends:

Parliament has said that under certain circumstances certain things are deemed to be dividends and manifestly the Commissioner of Taxation had no power to declare otherwise or to settle the limit of taxation thereunder, other than according to the statute itself.

[The ruling] cannot be invoked by the appellant as a ground for raising estoppel in this case, as to do so would be to nullify the requirement of the statute itself.<sup>23</sup>

The essential point is that the Commissioner had no authoritative power of decision affecting the obligation to pay tax.<sup>24</sup> Not even an assessment by the

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<sup>20</sup> The decision of the Supreme Court of Canada in *MNR v. Inland Indus. Ltd.* (1971), 23 D.L.R. (3d) 677, is to the same effect. The Minister had approved and registered a pension plan, and it was argued that he could not impose any assessment that did not allow deduction of contributions to the plan. Pigeon J. said (at 682): "[T]he Minister cannot be bound by an approval given when the conditions prescribed by the law were not met."

<sup>21</sup> S.C. 1970-71-72, c. 63.

<sup>22</sup> [1951] Ex. C.R. 18, 50 D.T.C. 871, [1950] C.T.C. 263.

<sup>23</sup> *Id.* at 25-27 (Ex. C.R.).

<sup>24</sup> There are other cases in which taxpayers have been prejudiced by the incorrect advice of taxing officials: *Gauthier v. MNR* (1977), 78 D.T.C. 1126 (T.R.B.); *South Sask. Motors Ltd. v. Min. of Fin. of Sask.*, [1977] 5 W.W.R. 727 (Sask. Q.B.). In some of the income tax cases, the Court relies on the discredited notion that estoppel simply does not apply against the Crown: e.g., *Western Vinegars Ltd. v. MNR*, [1938] 2 D.L.R. 503 (Ex. Ct.). In *Stickel v. MNR* (1972), 27 D.L.R. (3d) 721, 72 D.T.C. 6178, [1972] C.T.C. 211, the Federal Court, Trial Division held that the Minister's duty to assess in accordance with the Act could not be affected by the terms of an Information Bulletin because "estoppel is subject to the one general rule that it cannot override the law of the land" (at 732). However, where the government advice relied on can be construed as a statement of fact, there is authority for saying that estoppel can operate to prevent

Minister affects that obligation. Thus, as in *Gibbon v. The Queen*, the Minister cannot be estopped from reassessing a taxpayer who has been permitted to make deductions of amounts that do not qualify under the Act.<sup>25</sup>

It is not anything peculiar to income tax legislation that renders estoppel inappropriate. If a government official has the power only to *enforce* a statutory requirement or prohibition, he cannot preclude himself from exercising that power by any representation as to what is required or prohibited. In *Dickson v. Stevens*, the collector of customs was alleged to have given the plaintiff permission to remove certain goods from his vessel without filing a report.<sup>26</sup> The *Customs Act* prohibited the removal of goods before filing a report and authorized the collector to seize any vessel from which goods might have been unlawfully removed. The Supreme Court of New Brunswick held that, if the collector had given permission for the removal, he had no authority to do so and the permission could not affect the validity of the subsequent seizure.<sup>27</sup>

It is misleading to express the result of these cases by saying that estoppel cannot interfere with the performance of a statutory duty. The same result obtains where there is no duty to act, but merely a discretionary power. In *Southend-on-Sea Corp. v. Hodgson (Wickford) Ltd.*, the question arose whether a public authority could be estopped from exercising its discretionary power to issue an enforcement notice.<sup>28</sup> It was argued that, since the authority was not obliged to issue a notice in any event, it could be estopped by a prior determination that was not made in exercise of any authoritative power of decision. Lord Parker refused to distinguish between a statutory duty and a statutory discretion.

After all, in a case of discretion there is a duty under the statute to exercise a free and unhindered discretion . . . [A]n estoppel cannot be raised to prevent or hinder the exercise of the discretion.<sup>29</sup>

The point is that the legislature intends the discretion to be exercised on the basis of a proper understanding of what the statute requires. If an official is held to a decision that mistakes that understanding, he is precluded from any exercise of the discretion.<sup>30</sup>

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officials from taking a position contrary to that advice. See *The Queen v. Langille* (1977), 75 D.L.R. (3d) 124, 77 D.T.C. 5086, [1977] C.T.C. 144 (F.C.T.D.) and *Gibbon v. The Queen*, *supra* note 3, at 738 (D.L.R.).

<sup>25</sup> *Supra* note 3. See also *Cohen v. The Queen* (1978), 78 D.T.C. 6099 (F.C.T.D.).

<sup>26</sup> (1889), 31 N.B.R. 611.

<sup>27</sup> De Smith, *supra* note 4, at 89, summarizes the results of a group of similar English cases as follows: "Purported authorization, waiver, acquiescence and delay do not preclude a public body from reasserting its legal rights or powers against another party if it has no power to sanction the conduct in question or to endow that party with the legal right or immunity that he claims."

<sup>28</sup> [1961] 2 All E.R. 46.

<sup>29</sup> *Id.* at 48-49.

<sup>30</sup> Lord Parker C.J. said that the authority would be prevented from exercising its statutory discretion "if by reason of estoppel it is prevented from proving and showing that it is a valid enforcement notice in that amongst other things planning permission was required." *Id.* at 49.

Where the conduct or representation relied on is that of an official having authoritative power to determine what the legislation requires, it can hardly be said that estoppel would defeat the operation of the statute. When estoppel is raised, the official cannot point to the statute and say that it provides in some absolute way for certain rights and obligations that must be recognized and enforced.<sup>31</sup> Rights are not provided for save as determined by the official, and it is upon his determinations that reliance is placed. The individual does not rely on official conduct to contradict the law, rather, he invokes official conduct as an expression of the law. There is no reason, therefore, why the government should not be estopped.

In *Lever (Finance) Ltd. v. Westminster Corp.*, developers obtained an injunction restraining the planning authority from requiring demolition of a house.<sup>32</sup> The authority said that there had been a material variation in the construction of the house and that the necessary planning permission in respect of that variation had not been obtained. The developers said that they had received the assurance of the authority's planning officer that the permission of the authority was not required because the variation was not material. It is clear that the operation of the statute would be defeated if a "material variation" in construction not having the approval of the planning authority were sanctioned in the name of estoppel. Lord Denning, however, identified the weakness in this analysis when he asked: "who is to decide whether a variation is material or not?"<sup>33</sup> If it is the planning authority, then nothing more is required by the legislation than a determination by it that the variation is immaterial. That had been done by the planning officer. This left only the question whether the representations of the officer bound the authority and whether the authority should be permitted, in effect, to change its mind. The officer's representations were binding because it had been the practice of the planning authority to allow its officers to advise applicants in respect of variations. The authority could not change its mind because the developers had acted on the representation by proceeding with construction.

There might have been some question in the *Lever* case whether the planning body had any authoritative power to decide that the variation in construction was not material. This did not become an issue, however, because it had been part of the argument of the defendant corporation that Parliament had conferred upon it the power to determine not only whether planning permission should be granted, but also whether it was necessary at all.<sup>34</sup>

It is remarkable that in this case Lord Denning appeared to persist in a

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<sup>31</sup> The public official can only say that his understanding of what the legislation requires has changed. Whether he should be free to change his mind is the question dealt with in the next section of this paper. Of course, he may also say that the conduct or representation relied on was an excess of jurisdiction and in that sense that his earlier decision contradicts the statute. The problem of reliance on *ultra vires* acts is also dealt with *infra*.

<sup>32</sup> [1971] 1 Q.B. 220, [1970] 3 All E.R. 496.

<sup>33</sup> *Id.* at 230 (Q.B.), 500 (All E.R.).

<sup>34</sup> See Evans, *Delegation and Estoppel in Administrative Law* (1971), 34 Mod. L. Rev. 335 at 336.



view that had been the object of criticism in the House of Lords. In an earlier case involving facts similar to those in *Lever*, the Master of the Rolls had decided that an activity subject to licensing is not to be treated as illegal if a government official gives his assurance that no licence is required.<sup>35</sup> The House of Lords dismissed the appeal but disagreed with the reasoning in the Court below. Lord Normand said:

[I]t is certain that neither a minister nor any subordinate officer of the Crown can by any conduct or representation bar the Crown from enforcing a statutory prohibition or from prosecuting for its breach.<sup>36</sup>

In light of this, the judgment in *Lever* certainly appears recalcitrant. But Lord Denning's insight shows that there may be no statutory prohibition to be enforced if a public authority, with an authoritative power of decision in that respect, has determined that no licence is required.

The same perception that prevailed in *Lever* was applied in an earlier decision of the Court of Appeal. *North Western Gas Board v. Manchester Corp.* involved the power of local authorities to levy rates for municipal purposes on the basis of the assessed value of real property.<sup>37</sup> The basis of assessment in respect of premises occupied by any gas board was altered by retroactive legislation. As part of certain transitional provisions, the legislation directed that the local authority should collect from any gas board the amount by which a specified figure exceeded "the total amount of rates actually levied on the board" by the rating authority for the transitional period. During that period, certain amounts had been paid by the board to the local authority, and these amounts were designated in the accounts of the authority as "rates." The board claimed that these amounts should be taken into account in determining its liability under the transitional provisions, but the local authority denied that they were "rates actually levied on the board." This was something the authority could not be heard to say. Sellers L.J. spoke for a majority of the judges on this point:

It does not seem to me that the estoppel raised by the board seeks to prevent or hinder the proper performance by the corporation of their statutory duty. All that is being said is that they cannot be heard to say that the nature of the payments they received was not that of rates levied on the board when they are carrying out the statutory duty which [the Act] imposes on them.<sup>38</sup>

The local authority had determined that the amounts received by it were rates and the Court felt that the legislation required nothing more than that determination for the purposes of the particular duty to collect any deficiency.

### III. DISCRETIONARY POWERS AND BINDING DETERMINATIONS

It is only authoritative powers of decision that may be constrained by any prior representation, in words or conduct. The official exercising such a power must be free to do what the statute requires, but the statute does not require any particular result. Instead, it requires a decision by the official.

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<sup>35</sup> *Falmouth Boat Constr. Ltd. v. Howell*, [1950] 1 All E.R. 538.

<sup>36</sup> *Howell v. Falmouth Boat Constr. Ltd.*, [1951] A.C. 837, [1951] 2 All E.R. 278.

<sup>37</sup> [1963] 3 All E.R. 442.

<sup>38</sup> *Id.* at 451.

If the earlier representation is taken to embody such a decision, the operation of the statute is not defeated by requiring the official to act in accordance with his representation.<sup>39</sup> There is a problem, however, in the circumstance that the official might properly act otherwise were it not for the representation. Can his freedom of action be taken away by a representation?

Estoppel assumes importance only where the government proposes to do what it has power to do. Judicial review for excess of jurisdiction is adequate protection against any other sort of proposed action. Consequently, if it is to be effective at all, estoppel must have the effect of depriving a public authority of power it would otherwise enjoy. Yet it has always been said that a public authority cannot be estopped from exercising its statutory power or discretion. Even Lord Denning, who said the notion of Crown immunity from estoppel has long since been exploded, acknowledged the rule.<sup>40</sup> If this means that the authority must be free to do what it has power to do, it would seem that the government cannot be bound by its undertakings. The rule has been given that meaning, for de Smith says that the ambit of a public authority's powers cannot be abridged by its own conduct.<sup>41</sup>

I think the true position is otherwise, and may be expressed as follows. In respect of any authoritative power of decision, a public authority is bound by its undertakings but it cannot be estopped from exercising its power. What must be shown, of course, is that the exception does not swallow the rule.

When it is said that a public authority cannot be estopped from exercising its powers, reference is usually made to the leading decision of the House of Lords in *Ayr Harbour Trustees v. Oswald*.<sup>42</sup> During expropriation proceedings, the Harbour Trustees resolved to limit their use of the property to a use that would not interfere with the owner's access to it from adjoining property. The issue arose whether compensation for the property should be assessed on a basis consistent with that restriction. The House of Lords held that it should not, because the resolution of the Harbour Trustees was invalid. The Trustees enjoyed a discretionary power to construct such works as they

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<sup>39</sup> This is not recognized in a recent decision of the Federal Court, Trial Division. In *Gill v. The Queen* (1978), 88 D.L.R. (3d) 341, two aliens were required to give security deposits by an immigration officer pursuant to section 63 of the *Immigration Act*, R.S.C. 1970, c. I-2, to guarantee their departure from Canada by a stipulated date. The section provides that if an alien fails to leave Canada within the time prescribed, the immigration officer in charge "may order that the sum of money so deposited be forfeited." The aliens relied on representations that their deposits would not be forfeited while their application for landed immigrant status was being processed. The deposits were, however, forfeited. Cattnach J. held that the doctrine of estoppel could not be invoked against the Crown. He also said: "It is not open to the plaintiff to set up an estoppel to prevent the operation of the statute nor can representations made by departmental officers preclude the operation of the statute" (at 345). I do not see how the operation of the statute would have been defeated since the statute did not require forfeiture; it authorized the immigration officer to make an order of forfeiture, and in exercise of that authority the officer had decided that forfeiture was not appropriate in particular circumstances.

<sup>40</sup> *Wells v. Min. of Hous. and Local Gov't*, [1967] 2 All E.R. 1041 at 1044.

<sup>41</sup> *Supra* note 4, at 90.

<sup>42</sup> (1883), 8 A.C. 623 (H.L.).

thought fit for the benefit of the harbour. If effect were given to their gratuitous undertaking, it would prevent the Trustees from exercising that power. Consequently, the Trustees were incompetent to bind themselves in that manner. Lord Watson addressed the argument that the power of the Trustees was permissive only so that they might properly decide not to exercise it in any particular way. This, he said, would affirm a power in the Trustees to repeal the provisions of the statute which conferred the power.<sup>43</sup>

The House of Lords decision was applied by the Supreme Court of Canada in *R. v. Dominion of Canada Postage Stamp Vending Co.*<sup>44</sup> The Postmaster General had exercised his statutory power to grant licences to agents for the sale of postage stamps. The licensing instrument, in the form of an agreement, provided that the licence should not be revocable. The Court held nonetheless that the licence was revocable at the discretion of the Postmaster General. Having found that the power to grant licences carried with it as a necessary incident the power of revocation, Lamont J. went on to say:

A Minister cannot, by agreement, deprive himself of a power which is committed to him to be exercised from time to time as occasion may require in the public interest, or validly covenant to refrain from the use of that power when it may be requisite, or expedient in his discretion, upon grounds of public policy, to execute it . . .<sup>45</sup>

In each of these cases, the undertaking given was, in effect, an undertaking not to exercise the statutory power at all. The power of decision was one the legislature intended to be exercised from time to time as occasion and circumstances might seem to warrant. The Harbour Trustees and the Postmaster General said that a particular course of action would not be taken whatever the circumstances. These, then, were promises not to exercise the power of decision.<sup>46</sup>

What amounts to substantially the same thing is a promise to exercise the discretionary power in a particular way, when that promise is made outside the perspective within which the statute is intended to operate. In *Vancouver v. Registrar Vancouver Land Registration District*, developers and the City entered into a contract by which the City undertook to rezone property in consideration of the developers' covenants restricting their use of the property.<sup>47</sup> The agreement was unenforceable because the discretionary power to amend the zoning by-law was intended by the legislature to be ex-

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<sup>43</sup> *Id.* at 639-40.

<sup>44</sup> [1930] S.C.R. 500, [1930] 4 D.L.R. 241. It was also applied by the Court in *CPR v. The King*, [1930] S.C.R. 574, [1930] 4 D.L.R. 161, to meet the argument that the railway had by the acquiescence of government officers acquired the right to use Crown land in perpetuity [at 180-81 (D.L.R.)].

<sup>45</sup> *Id.* at 244 (D.L.R.).

<sup>46</sup> Two judges of the Supreme Court of Canada followed the *Ayr Harbour Trustees* case on this point in *Town of Cobalt v. Temiskaming Telephone Co.* (1919), 59 S.C.R. 62. Mr. Justice Anglin (with whom Mignault J. agreed) held that the town could not have granted an indefinite licence to the company because by doing so it would preclude itself from granting to any other company an exclusive licence, as it had the power to do "from time to time."

<sup>47</sup> [1955] 2 D.L.R. 709 (B.C.C.A.).

exercised after a public hearing had been held and all the relevant considerations weighed. The City had promised, in effect, to disregard any objections to the rezoning that might be forthcoming at the public hearing. No promise could be made at a time when factors intended to influence the discretion could not be known. In *Western Dominion Coal Mines Ltd. v. The King*, Mr. Justice Rand invoked the same principle to defeat the company's claim for a subsidy.<sup>48</sup> The company said that the Emergency Coal Production Board had induced it to believe that a subsidy would be paid. Rand J. noted that, whatever assurances might have been given, the Board could not at that time have determined whether the company qualified under the terms of the applicable Order in Council. He said:

[The subsidy] involved the discretion of the Board which could be exercised only after operating results became known and on an appreciation of all circumstances: a discretion which became executed only when the subsidy was in fact paid.<sup>49</sup>

In the case of powers of adjudication, the merits of the individual case are among the factors intended by the legislature to influence the discretion. This, of course, is reflected in the principle that a public authority cannot found its decision on a preconceived rule or policy formulation without reference to the exigencies of the particular case.<sup>50</sup> And it means also that the individual cannot hope to find a binding promise in what has been said or done by the public authority in other proceedings or in announcements of policy not associated with any particular case. In fixing rates for gas under *The Public Utilities Board Act*, the Manitoba Public Utilities Board is not bound by its interpretation of the phrase "in the public interest" made in the context of a prior case involving different circumstances.<sup>51</sup> Similarly, it has been held that the Ontario Labour Relations Board is not bound by its findings of fact made upon evidence in other proceedings.<sup>52</sup> So too, the City of Toronto is free to prosecute an individual for violation of its zoning by-law

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<sup>48</sup> [1947] S.C.R. 313, [1947] 3 D.L.R. 433.

<sup>49</sup> *Id.* at 452 (D.L.R.). Similar reasoning prevailed in *Rederiaktiebolaget Amphitrite v. The King*, [1921] 3 K.B. 500. The British Government had agreed, in wartime, that a Swedish ship would not be detained in port if the ship arrived with an "approved cargo." On a petition of right for damages for breach of the undertaking, Rowlatt J. said that "it is not competent for the Government to fetter its future executive action, which must necessarily be determined by the needs of the community *when the question arises*" (at 503; emphasis added). In argument, counsel for the Crown had said that clearance to leave an English port would have to depend upon the military exigencies at the time that it is applied for.

<sup>50</sup> The principle is carefully analyzed and explained by Molot, *The Self-Created Rule of Policy and Other Ways of Exercising Administrative Discretion* (1972), 18 McGill L.J. 310.

<sup>51</sup> *Re City of Portage La Prairie* (1970), 12 D.L.R. (3d) 388 (Man. C.A.). In *Re K & B Ambulance Ltd. and City of Prince Albert* (1977), 82 D.L.R. (3d) 202, [1978] 1 W.W.R. 39, the Saskatchewan Court of Appeal held that it was not sufficient to establish discrimination in the exercise of a licensing power merely to show that the tribunal refused to grant a licence, that it gave no reasons therefor and that a licence was subsequently granted to another applicant.

<sup>52</sup> *Re Thibault v. CLRB* (1957), 7 D.L.R. (2d) 526, [1958] O.W.N. 49, 57 C.L.L.C. 715 (H.C.).

even though it maintains a preferred list of properties immune from prosecutions for high density use in a single family zone.<sup>53</sup>

Even when a public authority has made a decision upon consideration of the facts of a particular case, it must be free to exercise judgment again in relation to the same facts where the discretionary power is one that the legislature intends to be exercised not once for all, but from time to time. Most subordinate legislative powers are of this kind,<sup>54</sup> as are some powers of adjudication. Hence, in *Turnbull Real Estate v. Sewell* it was held that the action of assessors in giving to a property owner for two successive years the benefit of a special rate of assessment could not work any estoppel as to future years.<sup>55</sup> The power of the assessors was one to be exercised in each taxation year, so that which was done in one year could not be a proper exercise of discretion in relation to subsequent years. The House of Lords has said the same thing in respect of the local valuation courts that perform the assessment function in the United Kingdom.<sup>56</sup> Public authorities that are empowered to receive successive applications in respect of the same subject-matter do not stand in quite the same position: they are justified in making a different decision on a fresh application only if new evidence is adduced.<sup>57</sup>

The point to be taken from the line of cases that begins with *Ayr Harbour Trustees* is this: a public authority is incompetent to give any undertaking that is incompatible with its discretionary power. This includes any promise not to exercise the power or any promise made in disregard or ignorance of factors intended to influence the discretion. If relevant factors are known and considered, an undertaking to act in a particular way should be valid and binding.

<sup>53</sup> *City of Toronto v. Polai*, [1970] 1 O.R. 483, 8 D.L.R. (3d) 689 (C.A.). See also *R. v. Catagas* (1977), 81 D.L.R. (3d) 396, holding that a "no-prosecution" policy in relation to Indians afforded the accused no defence to a charge under the *Migratory Birds Convention Act*, R.S.C. 1970, c. M-12. Chief Justice Freedman of the Manitoba Court of Appeal distinguished the policy from the ordinary exercise of prosecutorial discretion: "[I]n all these instances the prosecutorial discretion is exercised in relation to a specific case. It is the particular facts of a given case that call that discretion into play. But that is a far different thing from the granting of a blanket dispensation in favour of a particular group or race" (at 401). Notice should be taken, however, of a recent decision of the English Court of Appeal that treats inconsistency in the disposition of similar cases as a ground of judicial review. In *HTV Ltd. v. Price Comm'n*, [1976] I.C.R. 170, 120 S.J. 298 (C.A.), Lord Denning said that if the Commission regularly interprets the governing legislation in a particular way, and regularly applies it in a particular way, then "they should continue to interpret it and apply it in the same way thereafter unless there is good cause for departing from it" (at 185). Mullan, *Recent Developments in Nova Scotia Administrative Law* (1978), 4 Dalhousie L.J. 466 at 531-38, observes that the *HTV* case is the only Commonwealth authority where there has been review on this basis, and he points out that review for inconsistency is at odds with the general principle that tribunals must not lay down policies in advance by which all future matters will be decided.

<sup>54</sup> See *R. v. Ontario Milk Marketing Bd.* (1969), 4 D.L.R. (3d) 490, and *Re Westminster Mills Ltd. and Anderson* (1957), 21 W.W.R. 417.

<sup>55</sup> [1937] 2 D.L.R. 218, 12 M.P.R. 136 (N.B.C.A.).

<sup>56</sup> *Soc'y of Medical Officers of Health v. Hope*, [1960] A.C. 551, [1960] 1 All E.R. 317 (H.L.). See also *Caffoor v. Comm'r of Income Tax*, [1961] A.C. 584, [1961] 2 All E.R. 436 (P.C., Ceylon).

<sup>57</sup> See Mullan, *Comments* (1971), 49 Can. B. Rev. 624 at 631 n. 25.

*Ingledeu's Ltd. v. Vancouver* is a case which shows clearly that the government may be held to promises that are compatible with discretionary power.<sup>58</sup> As part of a redevelopment scheme, the municipal council passed resolutions authorizing an agreement with developers pursuant to which the City would be required to expropriate a parcel of land and to provide parking facilities on sites adjacent to the parcel. The agreement was challenged by an owner of land in the parcel to be expropriated. It was argued, *inter alia*, that the agreement interfered with the discretion of the municipal council. In relation to the provisions of the agreement dealing with parking facilities, the Court agreed with this argument, because at the time of making the agreement the council could not have considered the many factors that would make one site more suitable than another and no particular site was identified in the agreement. The parcel to be expropriated, however, was specifically identified. When it resolved to enter into the agreement, the council could and did consider all factors relevant to the compulsory acquisition of that parcel. The resolution was in substance a decision to acquire the land, and the discretionary power of the council, far from being abdicated, was actually exercised when the resolution was passed; it was then that the policy of expropriation was considered.<sup>59</sup>

If it can be said that discretion is actually exercised at the time an undertaking is given, then to make the undertaking binding is not to estop the authority from exercising its discretionary power. The power is exercised in making the promise. What *does* estop a public authority from exercising its power is to bind it to something done or said otherwise than as a proper exercise of the discretion. Or, as it is expressed in a leading statement of the rule, something done "beforehand outside their statutory duty and acting as private contractors."<sup>60</sup>

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<sup>58</sup> (1967), 61 D.L.R. (2d) 41, 58 W.W.R. 641 (B.C.S.C.).

<sup>59</sup> MacDonald J. relied on the judgment of Spence J. in *Re Sandwich W. Twp.*, [1960] O.W.N. 387 (H.C.). It involved the validity of a municipal by-law authorizing an agreement by which the municipality undertook to pass certain redevelopment by-laws. Spence J. said at 388:

[T]he municipality instead of abdicating its power to pass by-laws, or to refuse to pass them in the future had actually exercised that power in dealing with the by-law included in the agreement.

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The by-laws which it had definitely undertaken to pass were by-laws, which by the provisions of the *Planning Act* it was empowered to pass, and the policy of enacting such by-laws had already been considered when the by-law in question was enacted.

<sup>60</sup> *Sunderland Corp. v. Priestman*, [1927] 2 Ch. 107 at 116, [1927] All E.R. 460 at 464 *per* Tomlin J. *Comm'rs of Crown Lands v. Page*, [1960] 2 Q.B. 274, is a classic illustration of this statement of the rule. It was held in the *Page* case that the implied covenant for quiet enjoyment in a lease from the Crown was not broken by the Crown's requisition of the leased property in wartime. Lord Evershed said: "I am not, however, satisfied that in a demise by the Crown the covenant for quiet enjoyment implicit in the demise would extend to prevent the future exercise by the Crown of powers and duties imposed upon it in its executive capacity by statute" (at 287). In holding that nothing can be binding that is not an exercise of the discretionary power, these cases parallel those which say that there can be no estoppel based on the representations of any person other than the official who holds the power of decision. *R. v. Laister*, [1969] 1 O.R. 580, 3 D.L.R. (3d) 272 (H.C.), is a classic case. A town clerk decided that no prosecution

This is no mere playing with words. Where the legislature confers a discretionary power, what it wants is not a particular result but an exercise of judgment. If the official has applied his mind to the facts of the particular case and has represented what course of action he will follow, then he may be held to that representation without denying effect to the provisions of the statute. Nothing in the nature of discretionary powers requires that the official should be free to change his mind. There is emerging a recognition, therefore, that he cannot change his mind.

It is well known that tribunals whose powers are purely administrative are not obliged to hold a hearing unless the statute requires one. What this means in positive terms is that the discretion of the tribunal extends to choice of procedure. Yet there are cases suggesting that the tribunal may by its own assurances preclude itself from acting without a hearing. Two Canadian judges have expressed that view without invoking estoppel. In one case, Mr. Justice Milvain of the Alberta Supreme Court said that "where an administrative body embarks upon a hearing to which interested parties are invited to attend, then such hearing must be conducted along lines consonant with the principles of natural justice. . . ."<sup>61</sup> In an Ontario case, Mr. Justice Hartt said of the Workmen's Compensation Board that "the Board, having held out the fact of a hearing both to the applicant and to the public at large, must then so conduct it in a manner consistent with those principles which have so often been clearly set out."<sup>62</sup>

In at least one case, the principle of natural justice has served as a basis for holding a judicial tribunal to its procedural undertaking. In *Re Loblaw's Ltd. and Ludlow Investments Ltd.*, the Ontario Court of Appeal characterized as a breach of natural justice the failure of the municipal Committee of Adjustment to abide by its undertaking that notice of its decision would be

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would be instituted in respect of a clear breach of the municipal zoning by-law, and he so advised the property owner by letter. It was, however, the Town Council that was authorized to exercise the discretion in that respect. There being no evidence that the letter had been sent pursuant to a direction or resolution of the Town Council, the municipality could not be estopped from instituting the prosecution. There are a number of other Canadian cases that involve the same rationale. In *St. Ann's Island Shooting and Fishing Club Ltd. v. The King*, *supra* note 6, it was held that the Crown would not be estopped from challenging leases made by the Superintendent General of Indian Affairs when the *Indian Act* required that reserves surrendered to Her Majesty be leased as directed by the Governor in Council. In *Spiers v. Toronto Township* (1956), 4 D.L.R. (2d) 330, [1956] O.W.N. 427 (H.C.), a representation from the City Solicitor that might have been construed as a promise not to enact a restrictive zoning by-law was held incapable of estopping the municipality. In *R. v. Gooderham and Worts Ltd.* (1928), 62 O.L.R. 218, [1928] 3 D.L.R. 109 (S.C.), the act of officials under the *Customs Act* in issuing certificates of export could not affect the obligation to prove that the goods were exported for the purposes of claiming exemption under the *Special War Revenue Act*, R.S.C. 1927, c. 179. See also *Ontario Mining Co. v. Seybold*, [1903] A.C. 73 (P.C., Ont.). A decision of the House of Lords to the same effect is *CIR v. Brooks*, [1915] A.C. 478 (H.L.), where it was held that in determining liability to super-tax the Special Commissioners were not estopped from fixing taxable income at an amount different from that determined by the Commissioners for the purposes of ordinary income tax.

<sup>61</sup> *R. v. City of Calgary* (1965), 53 D.L.R. (2d) 477 at 478, 53 W.W.R. 638 at 640 *per* Milvain J. (Alta. S.C.).

<sup>62</sup> *R. v. Workmen's Comp. Bd.*, [1968] 1 O.R. 571 at 573 (H.C.).

given.<sup>63</sup> It is interesting to note that essential elements of estoppel were present: the party who relied on the promise as to notice missed the time for appealing to the Ontario Municipal Board.<sup>64</sup> It is not clear whether natural justice requires a tribunal to abide by procedural undertakings when these are found in general directives or manuals not addressed to any particular case. Chief Justice Laskin, dissenting in *Martineau v. Matsqui Institution Inmate Disciplinary Board*, thought that the duty to follow a formal procedure prescribed for the benefit of inmates arises from its very prescription.<sup>65</sup> There are other cases that say the general rule is otherwise.<sup>66</sup> Laskin C.J.C.'s opinion seems to contradict the principle that discretion must be exercised on the basis of the merits of the individual case.

In 1972 the English Court of Appeal faced the argument that, since the government cannot be estopped, it cannot be made to abide by an undertaking that parties will be heard before a decision is taken.<sup>67</sup> The case was *R. v. Liverpool Corp. ex parte Liverpool Taxi Fleet Operators' Association*.<sup>68</sup> Lord Denning referred to the principle applied by the House of Lords in *Ayr Harbour Trustees*, i.e., that a public corporation cannot contract out of statutory duties. He then said:

But that principle does not mean that a corporation can give an undertaking and break it as they please. So long as the performance of the undertaking is compatible with their public duty, they must honour it.<sup>69</sup>

Here is an authoritative statement of the proposition I made earlier. A public authority may be held to its promises without being estopped from performing its duty. If the discretion associated with a power is actually exercised at the time an assurance is given, then performance of the undertaking is not incompatible with the public duty of the authority. This is what occurred in the *Liverpool* case.

De Smith says of the decision that it broke new ground, but he suggests that it might have limited operation because "quasi-estoppel operated not, it would seem, to predetermine the substance of the discretionary decision but to prescribe the procedure by which it had to be reached."<sup>70</sup> Once it is admitted, however, that estoppel does apply to government agencies, why should discretion in procedural matters be distinguished from discretion in substan-

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<sup>63</sup> (1975), 7 O.R. (21) 665, 56 D.L.R. (3d) 329 (C.A.).

<sup>64</sup> Kelly J.A. said, *id.* at 329-30 (D.L.R.): "[W]hen [the Committee of Adjustment] gave its assurance to the solicitor that he would be notified, the failure to do so and the consequent frustration of the exercise of the right to appeal until the time fixed by the statute had elapsed, was a denial of natural justice. . . ."

<sup>65</sup> [1978] 1 S.C.R. 118, 74 D.L.R. (3d) 1, 33 C.C.C. (2d) 366.

<sup>66</sup> E.g., *Re Civil Service Ass'n of Alta.* (1977), 74 D.L.R. (3d) 48 (Alta. S.C.); *Western Realty Projects Ltd. v. City of Edmonton*, [1974] 5 W.W.R. 131 (Alta. D.C.).

<sup>67</sup> In none of the Canadian cases referred to above did the court base its decision on estoppel.

<sup>68</sup> [1972] 2 Q.B. 299, [1972] 2 All E.R. 589 (C.A.).

<sup>69</sup> *Id.* at 308 (Q.B.).

<sup>70</sup> *Supra* note 4, at 91.



tive matters?<sup>71</sup> I think, with respect, that Lord Denning had no intention of limiting his reasoning to the particular situation involved in the *Liverpool* case. He supplied a test to determine when undertakings are binding, and the test is applicable generally to discretionary powers: is the performance of the undertaking compatible with the public duty?

Indeed, it seems to me that Lord Denning had earlier applied "quasi-estoppel" to the substance of a discretionary decision. In *Lever*, the power of the municipal corporation to issue an enforcement notice depended on whether, in its judgment, the variation in construction was "material." The corporation's planning officer had said earlier that the variation was immaterial, and on that basis the corporation had no power to issue a notice. But, of course, if the corporation were permitted to exercise judgment on the matter a second time and to determine that the variation was material, then its power to issue a notice would be revived. Lord Denning held that the initial determination, taking the form of an assurance from the planning officer, was binding on the corporation. It could not consider the matter again because the developer had acted on the assurance by proceeding with construction.<sup>72</sup> This is not merely my own understanding of what was done in *Lever*; in the *Liverpool* case Lord Denning cited his earlier decision as authority for holding the municipal corporation to its undertaking in relation to procedure.

There is a small group of important Canadian cases in which representations have operated to predetermine the substance of discretionary decisions. In each case, the public authority enjoyed the power to make the particular decision which the court found it was by its prior representation bound to make. And in each case it could be said that the element of discretion associated with the power had been actually exercised at the time of that representation. As a result, though bound by its undertakings, the authority was not estopped from performing its public duty.

One case, *Re Multi-Malls Inc. and Minister of Transportation*, straddles the distinction between substance and procedure.<sup>73</sup> Under *The Planning Act* of Ontario the Minister is authorized to approve the draft official plan of a

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<sup>71</sup> There is, of course, the constitutional principle applied to a legislative body: while it is not bound by self-imposed restraints as to the content, substance or policy of its enactments, it may be bound by self-imposed procedural (or manner and form) restraints on its enactments. See Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 1977) at 201. This may only reflect that the discretion associated with legislative powers is not to be exercised once for all but from time to time. Accordingly, undertakings as to the substance of future legislative action are not compatible with the discretionary powers.

<sup>72</sup> Lord Denning M.R. said of the planning officer's assurance: "being acted on, it is binding on the council." *Supra* note 32, at 203 (Q.B.). Lord Denning did not refer to his earlier judgment in *Robertson v. Min. of Pensions*, *supra* note 6, in which he denied that the Crown cannot bind itself so as to fetter its future executive action. When a public authority has made a decision, he said, "I see no reason for implying a term that the Crown is to be at liberty to revoke the decision at its pleasure and without cause." *Id.* at 231-32 (K.B.). That same thinking is behind Lord Denning's recent judgment in *HTV Ltd. v. Price Comm'n*, *supra* note 53.

<sup>73</sup> (1976), 14 O.R. (2d) 49, 73 D.L.R. (3d) 18 (C.A.).

municipality. Section 15(1) provides that the Minister may refer any part of the plan to the Municipal Board and that he do so upon request by any person. Upon the submission to him of a draft plan, the Minister gave his assurance that a particular aspect of the plan (in respect of which the Minister had been requested to make a modification) would be referred to the Municipal Board. As it happened, the Minister did not refer the matter, and he approved the plan without the modification requested. The Ontario Court of Appeal held that the Minister's approval was not valid. Giving judgment for the Court, Lacourcière J.A. relied on the decision of the English Court of Appeal in the *Liverpool* case. He said:

In my view, on this basis, it was implicit in the assurances given by the Ministry that the plan would not be approved without the requested modifications unless there was a reference to the Board. The appellants relied on the assurances to their detriment, as they themselves could and would have requested the Minister to refer the matter. The *Liverpool* decision . . . imposed on the Minister, in accordance with natural justice if not by estoppel, the duty not to give approval to the unmodified official plan without referring the matter to the Municipal Board for a public hearing, in accordance with his statutory duty and the assurances given. (Emphasis added)<sup>74</sup>

In this case, as in *Liverpool*, the public authority chose to decide a question before circumstances had arisen calling for the appropriate executive action. It sometimes happens that executive action is separated from the determination of a question by the very nature of that determination. In licensing matters, for example, the authority may require certain actions of the applicant as a condition of granting the licence. The decision to issue the licence if the conditions are met is effectively made, but issuance of the licence is postponed until that happens. *Lever* shows that the determination of the question is conclusive,<sup>75</sup> and so do some Canadian cases. In *Cutt v. City of Langley*, the municipal council responded to an application for a building permit by passing a resolution as follows: "That . . . the Council now agrees to the granting of a building permit for the proposed hotel . . . on the condition that all the off-street parking required be located on property owned by the applicants."<sup>76</sup> The applicants acted upon the resolution by purchasing additional property and carrying out demolition to prepare it for parking facilities. Subsequently, the council reconsidered its earlier resolution and defeated the motion. The British Columbia Supreme Court awarded *mandamus* to compel the issuance of a building permit. Having made the decision to grant a permit, the council was bound to issue one, provided only that the applicants fulfilled the conditions which had been imposed.<sup>77</sup> In *British*

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<sup>74</sup> *Id.* at 34-35 (D.L.R.).

<sup>75</sup> In that case, the determination that the variation in construction was immaterial made any executive action unnecessary.

<sup>76</sup> [1975] 2 W.W.R. 756 (B.S.S.C.).

<sup>77</sup> *Id.* at 761. *Re Cogan* (1974), 3 O.R. (2d) 661, 46 D.L.R. (3d) 481 (D.C.) supports this position. The issuance of a building permit was delayed for some considerable period of time while the developer endeavoured to cooperate in solving certain municipal problems in which it was under no legal obligation to become involved. A revised application for a permit was subsequently refused because in the meantime the municipality had expressed a clear intent to rezone. The Court awarded *mandamus* on the ground that it would be "unjust and inequitable" that the applicant should be

*Columbia Hop Co. Ltd. v. District of Kent*, the municipal council agreed that it would close a road across the plaintiff's land if the plaintiff would transfer other land to it for use as a highway.<sup>78</sup> This the plaintiff did, but no by-law closing the road was ever passed. Years later the municipality relied on the absence of a by-law to support its position that the old road was still open. Macdonald J. said:

Would it not, however, be inequitable to allow any such claim, for a roadway, as is now asserted by the municipality, to be set up to the detriment of the plaintiff's right to use of the property? I think the facts call for the application of the principle of estoppel, insofar as the powers of the municipality could have been exercised to effect the intention of the parties.

The municipality should be precluded, as a private individual would have been under like circumstances, from denying ... that the road in question should continue to be closed. This was the intention of the parties and should be implemented by the council of the municipality, insofar as its power extends.<sup>79</sup>

These decisions are supported by the judgment of the Supreme Court of Canada in *Re Viola*.<sup>80</sup> Two brothers were ordered deported under the *Immigration Act*, and their appeals to the Immigration Appeal Board were dismissed. Section 31(4) of the Act empowered the Minister to review the decision of the Appeal Board in any case and, for that purpose, to direct that the execution of the deportation order be stayed pending his review and decision. The Minister decided to review the cases, and he issued orders directing that the execution of the deportation orders be stayed for a period of twelve months (six months in the case of one brother) "to give you a chance to demonstrate that you can rehabilitate yourself," at the end of which time the Minister would make his decision based on reports from the Immigration Department. The brothers apparently behaved themselves, and they heard nothing from the Department for a period of three years. They then received notices that the Minister had confirmed the deportation orders, and they were arrested for the purpose of deportation. A majority of the Supreme Court of Canada held that the Minister had no power to order deportation after expiry of the "probationary periods" in the absence of any event occurring during that time that would have justified his so doing. Martland J. said that the order directing a stay was really more than that; it was in substance a decision to quash the deportation orders conditional on good behaviour.<sup>81</sup> It was an exercise of the Minister's power of review, and he enjoyed no authority to reconsider that decision or to carry out a further review.

*Alexander v. Village of Huntsville* is a similar sort of case.<sup>82</sup> A by-law exempting property from taxation had been passed pursuant to an agreement

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affected by the expressed intention to rezone. In substance, the municipality was required to issue a permit because the decision to grant one had been made before the rezoning resolution was passed.

<sup>78</sup> [1925] 3 D.L.R. 171, [1925] 2 W.W.R. 31 (B.C.S.C.).

<sup>79</sup> *Id.* at 175 (D.L.R.).

<sup>80</sup> [1965] S.C.R. 232, 51 D.L.R. (2d) 506, 46 C.R. 68, [1966] 1 C.C.C. 8.

<sup>81</sup> It was as if the Minister had allowed the appeals from the Immigration Appeal Board, conditional on good behaviour, as opposed simply to staying execution of the orders.

<sup>82</sup> (1894), 24 O.R. 665 (C.P.).

between the municipality and the property owner. There was a breach of the agreement, giving rise to a power in the municipality to repeal the exempting by-law. But the council resolved instead not to take advantage of the breach of condition and to confirm the exempting by-law. It was held that this action prevented the municipality from subsequently passing a by-law to repeal the exemption. The council had already exercised its discretion on the matter, and it was not free to consider the question again. Rose J. said:

Whether it be called acquiescence, waiver, election, or estoppel, it seems to me the facts above stated, prevent the corporation taking advantage of the [breach] to declare a forfeiture or put an end to the exemption . . .<sup>83</sup>

If an authority is bound to take substantive executive action in accordance with its prior determinations, then it is but a short step, or perhaps no step at all, to hold that a promise of future executive action is binding if that promise necessarily involves a determination of the question upon which the propriety of executive action depends. Promises of that sort relating, arguably at least, to procedural action have been held binding.<sup>84</sup> Nothing in logic or reason requires that a line be drawn there.

*Re Smith and The Queen*<sup>85</sup> and *Re Smith and Municipality of Vanier*<sup>86</sup> are perhaps the strongest of the cases being considered here because each clearly crosses that line. In the first case, a Crown prosecutor broke his promise not to prosecute someone in return for information. Berger J. granted a writ of prohibition on the ground of abuse of process and violation of the fundamental principles of justice. He said: "I think what occurred in this case constitutes oppression. The ordinary man is entitled to expect that the Crown will keep its word."<sup>87</sup> The facts of the second case are somewhat more complicated, but the principle applied is the same. Smith applied for a licence to operate a public hall. The municipality enjoyed a statutory power to grant or refuse the licence in its discretion. The licence was refused. Smith commenced *mandamus* proceedings, and the respondent municipality based its answer entirely on three deficiencies relating to fire safety and insurance. Smith did not contest the deficiencies and his *mandamus* application was

<sup>83</sup> *Id.* at 674.

<sup>84</sup> *Re Multi-Malls*, *supra* note 73, is the leading Canadian case.

<sup>85</sup> (1974), 22 C.C.C. (2d) 268 (B.C.S.C.). I am indebted to Professor David Mullan for drawing this case to my attention. See *Mullan*, *supra* note 53, at 473-74.

<sup>86</sup> [1973] 1 O.R. 110, 30 D.L.R. (3d) 386 (H.C.).

<sup>87</sup> *Supra* note 85, at 272. Professor Mullan, *supra* note 53, at 474n., points out that the decision of the Supreme Court of Canada in *Rourke v. The Queen*, [1978] 1 S.C.R. 1027, 76 D.L.R. (3d) 193, [1977] 5 W.W.R. 487, 35 C.C.C. (2d) 129, has thrown into considerable doubt this emerging ground of judicial review, at least in the context of criminal proceedings. It should perhaps be noted at this point that the decision in *Re Smith and the Queen*, *supra* note 85, does not contradict what was decided in *Southend-on-Sea Corp. v. Hodgson (Wickford) Ltd.*, *supra* note 28. It was held there that a mistaken representation relating to the substantive requirements of legislation could not fetter the discretion of the public authority in issuing an enforcement notice. The difference between the two cases is that the representation in *Re Smith* related to a matter in respect of which the public authority (Crown Prosecutor) enjoyed an authoritative power of decision. An official with enforcement powers has no authoritative power to decide whether the provisions of the statute have been violated, but he may decide authoritatively whether the enforcement machinery should be applied in any particular case.

dismissed. He did, however, take steps to remedy the deficiencies and then launched a second application for *mandamus*. The second application was necessary because in the interim the municipal council had passed a resolution that "in the public interest a licence to operate a public hall not be issued." The Ontario High Court awarded *mandamus*. The expressed basis of the decision was bad faith, but the label is not important. The municipality had by its own conduct limited its freedom of executive action, and the language of the judgment reflects an aversion to precisely the kind of injustice that gives the principle of estoppel its appeal. Pennell J. said:

Would not a reasonable man be entitled to assume from the posture of the Municipal Council on return of the first motion that approval would be forthcoming if he remedied the deficiencies? In the present case, the applicant ordered his affairs accordingly. Then, after completing the deficiencies with the financial consequences which that entailed he finds that the Council refused to issue the licence . . . . I am of opinion that there was a want of good faith in law and accordingly an order of mandamus may issue.<sup>88</sup>

Here, it could not be said that the council had decided to issue a licence subject to conditions; at best, there was a promise of future executive action implicit in the council's conduct. And if estoppel operated here, it operated to predetermine the substance of the discretionary action.

But there is something even more significant about the *Smith* case. If there was a promise of future action, it was a promise only in the mind of the applicant, because it is apparent that the municipality had no intention of issuing the licence, whether or not the deficiencies were remedied.<sup>89</sup> There is no possibility of explaining the decision simply on the basis that the municipality had made a decision that it was not free to reconsider. It must be added that the municipality was taken to have decided what it did not decide and, perhaps, what it had no intention of deciding. Putting the matter another way, the municipality was estopped from saying that it had not decided to issue the licence if the deficiencies were remedied.

One of the minority judges in the Québec Court of Appeal had invoked the same principle when *Re Violi* was before that Court.<sup>90</sup> The basis of the judgment of Montgomery J. was not that the Minister had decided to quash the deportation orders, but that his lack of action on the matter gave that appearance. He said that, after expiry of the probationary periods, it was reasonable for the brothers to suppose that the original deportation orders had lapsed, and the Minister's extended procrastination was "such as to constitute an *implied renunciation* . . . of the right to carry into effect the original deportation orders."<sup>91</sup>

There is a recent decision of the Alberta Supreme Court that lends sup-

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<sup>88</sup> *Supra* note 86, at 116 (O.R.), 392 (D.L.R.). In *Re Rodenbush and Dist. of N. Cowichan* (1977), 76 D.L.R. (3d) 731 at 735, Ruttan J. of the British Columbia Supreme Court said that a municipal council acted in "bad faith" when it rezoned land to prohibit a particular development after having lulled the developer into a belief that his application for a permit would be approved.

<sup>89</sup> It appears that the Council had not addressed its mind to the matter until after the deficiencies had been remedied.

<sup>90</sup> *Supra* note 80.

<sup>91</sup> *Id.* at 511 (D.L.R.) (Emphasis added).

port to this position, though it stops short of the full implications of estoppel. In *R. v. Industrial Coal and Minerals*, a lessee of Crown mineral rights applied to the Minister for a renewal of its lease.<sup>92</sup> The right of the lessee to a continuation of the lease depended upon whether "in the opinion of the Minister," there was a well capable of production on the property. The lessee asserted in his application for renewal that there was such a well. It was almost two months later, and only nine days before the expiry date of the lease, that the Department replied, and it did so by requiring the lessee to prove production capability by drilling a new well. Relying on the notion that administrative bodies must act fairly, the Court held that the Minister was not free to exercise his discretion in that fashion. The Minister was required to give the lessee a reasonable opportunity to satisfy the Department's drilling requirements. This had not been done. Indeed, "the department's belated response . . . to the applicant's assertion of a right was, in effect, no communication at all."<sup>93</sup> In the absence of any alternative solution, it seems that the Court would have been prepared to hold that the Minister had no power at that late date to question the applicant's assertion. However, rather than relieving the lessee altogether of the drilling requirement, the Court declared that the lease should continue in effect for such period of time as would give the lessee a reasonable opportunity to satisfy the requirement. If an administrator must act promptly, it is not difficult to infer a decision favourable to the individual from a failure to do so.

What I have said here may be summarized as follows. A public authority cannot be estopped from exercising its powers. But once the authority has decided that a particular exercise of power is appropriate, it must act accordingly, at least where there has been reliance on that decision.<sup>94</sup> A promise of

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<sup>92</sup> [1977] 4 W.W.R. 35 (Alta. S.C.).

<sup>93</sup> *Id.* at 45 per Moshansky J.

<sup>94</sup> There are, of course, cases in which courts have refused, for one reason or another, to hold a public authority to a representation that might have been construed as an exercise of decision-making power. In *Re Armstrong and Canadian Nickel Co. Ltd.*, [1970] 1 O.R. 708, 9 D.L.R. (3d) 330, a Mining Commissioner who had granted an order extending the life of a mining claim then refused to overturn the acceptance by the mining recorder of an adverse claim filed after the order was granted but before registration. The Court said at 337 (D.L.R.): "I might in view of the almost contradictory action . . . of his own office . . . have reached a different conclusion; but this Court cannot substitute an opinion of its own for that of an administrative tribunal without the clearest evidence, lacking here, that the tribunal has abrogated its function." In *Re Cambridge Leaseholds Ltd. and City of Toronto*, [1973] 3 O.R. 395, 37 D.L.R. (3d) 60, the Ontario High Court refused to quash a rezoning by-law for bad faith though the property in question had been purchased on the faith of assurances from local aldermen and the municipal planning staff that the proposed development could proceed. The Court could find no basis to quash though it "strongly animadverted on proceedings taken by the council contrary to stipulations or arrangements previously made. . . ." at 63-64 (D.L.R.) quoting Marten J.A., *Re Howard and City of Toronto* (1928), 61 O.L.R. 563 at 577, [1928] 1 D.L.R. 952 at 967 (H.C.). In *Bay Village Shopping Centre Ltd. v. City of Victoria*, [1974] 3 W.W.R. 418 (B.C.S.C.), a Council resolution to enter into a land use contract with the plaintiff was taken to be "a mere expression of willingness to enter into an agreement . . .," which the council could revoke at any time. This accords with the view expressed by Lord Denning in *Robertson v. Min. of Pensions*, *supra* note 6, at 231 (K.B.), 770 (All E.R.), that a public authority is not bound by a mere expression of intention, as opposed to a promise intended to be binding.

future executive action is binding precisely because it necessarily involves a decision that the promised action is an appropriate exercise of the power. To this point, nothing more is involved than the proposition that decisions made cannot be reconsidered, even though they may not have been implemented by executive action.<sup>95</sup> But the principle is taken one step further in cases such as *Re Smith and Municipality of Vanier*. When the authority by its conduct leads the individual to believe that a decision has been made, it is to be treated as having made that decision. And having made it, the authority must act accordingly.

This last extension of the principle may seem innocent enough, but it poses a real problem. When it confers a discretionary power, the legislature wants an exercise of judgment by the public authority. The object of the statute must not be defeated. This would seem to foreclose the possibility of requiring administrative action that contradicts the judgment of the authority. Yet that is precisely what was required in *Re Smith and Municipality of Vanier*. The municipality was not required to act in accordance with any actual exercise of its discretionary power. It was an apparent exercise of judgment that was binding.

#### IV. THE *ULTRA VIRES* PROBLEM

In cases such as *Woon v. MNR* it was said that the Crown cannot be estopped. The concept of an authoritative power of decision was invoked to distinguish such cases from those in which government agencies have been held to their earlier determinations. In applying that concept, however, it became apparent that estoppel was not necessarily the operative principle. The principle is simply that an agency has no power to reconsider its authori-

<sup>95</sup> The binding quality of promises parallels the restraint on the power of government agencies to rescind their formal decisions. A valid judicial determination cannot be rescinded by the body making it save on very limited grounds, and the competence of administrative bodies to rescind their decisions depends heavily on considerations of equity and public policy. De Smith, *supra* note 4, at 93-94. Indeed, Canadian courts lean to the view that administrative decisions cannot be rescinded in the absence of express statutory authority. Compare *Canadian Industries Ltd. v. Development Appeal Bd. of Edmonton* (1969), 9 D.L.R. (3d) 727, 71 W.W.R. 635 (Alta. C.A.); *Zorba's Food Services Ltd. v. City of Edmonton* (1970), 12 D.L.R. (3d) 618, 74 W.W.R. 218 (Alta. C.A.); *Cheeseworth v. City of Toronto* (1921), 49 O.L.R. 68, 58 D.L.R. 665 (S.C.); *Lambert v. Alberta Teachers' Ass'n*, [1978] 6 W.W.R. 184; *Re Lugano and MMI* (1977), 15 N.R. 251, 75 D.L.R. (3d) 625 (Fed. C.A.); and *Re City of Brantford and Bray*, [1972] 2 O.R. 525, 26 D.L.R. (3d) 129 (C.A.); with *Grillas v. MMI*, [1972] S.C.R. 577, 23 D.L.R. (3d) 1; *Re Wall and Redevelop Corp. and Vancouver* (1974), 47 D.L.R. (3d) 155 (B.C.C.A.); and *Re Lornex Mining Corp. and Bukwa* (1976), 69 D.L.R. (3d) 705, [1976] 5 W.W.R. 554 (B.C.S.C.). In the case of judicial tribunals, it is *res judicata* or estoppel by record that prevents the tribunal from reconsidering a matter in respect of which it has rendered final judgment. See *Jowett v. Earl of Bradford*, [1977] 2 All E.R. 33 (Employment Appeal Tribunal). I agree with de Smith, however, that "the concept of *res judicata* in administrative law is so nebulous as to occlude rather than clarify practical issues . . ." (*supra* note 4, at 94). *Re Fernie Mem. Hosp. Soc'y and Duthie* (1963), 42 W.W.R. 511 (B.C.S.C.), *aff'd* (1964), 43 D.L.R. (2d) 477, 47 W.W.R. 120 (B.C.C.A.), is a good example of the distracting influence of the concept. A hospital board reversed its decision to reinstate an employee. The Court held that the board was free to do so because it was an administrative tribunal to which the principle of *res judicata* does not apply. The Court did not consider whether on any other grounds the decision of the board ought to have been irreversible.

tative determinations where these have been relied on by persons affected. No case has yet been made for estoppel against the government. We now reach the question whether a public authority can be bound by a determination not properly made, or not made at all.

The issue arose in *Robertson v. Minister of Pensions*, and Lord Denning constructed a principle to deal with it.<sup>96</sup> An army officer wrote to the War Office regarding his pension rights arising from a disability. The War Office had no power over the administration of pensions, but it replied nonetheless that the plaintiff's case had been duly considered and that his disability had been accepted as attributable to military service. The plaintiff relied to his detriment on this advice. The Minister of Pensions decided subsequently that the plaintiff's disability was not attributable to military service. Lord Denning thought that the plaintiff should not be prejudiced by any lack of authority in the War Office. He said:

[I]f a government department in its dealings with a subject takes it upon itself to assume authority upon a matter with which he is concerned, he is entitled to rely upon it having the authority which it assumes. He does not know, and cannot be expected to know, the limits of its authority.<sup>97</sup>

As a result, the Minister of Pensions was bound by the War Office determination.

Lord Denning's principle is broad enough to produce a different result even in a case like *Woon v. MNR*.<sup>98</sup> The Minister would be bound by the unequivocal ruling of the Commissioner of Income Tax, though the Commissioner had no authoritative power of decision. It is well known that the principle did not appeal to the House of Lords. When Lord Denning repeated it in a subsequent case,<sup>99</sup> he was rebuked in language I have already quoted, as follows:

[I]t is certain that neither a minister nor any subordinate officer of the Crown can by any conduct or misrepresentation bar the Crown from enforcing a statutory prohibition or from prosecuting for its breach.<sup>100</sup>

What is remarkable about that language is the reference to a "statutory prohibition." The House of Lords rejected Lord Denning's principle just because it would produce a different result in such cases as *Woon v. MNR*, cases in which assurances are given by someone having no authoritative power of decision in the matter. The net had been cast too widely.

Without Lord Denning's principle, however, there seems to be no basis for holding a public authority to a decision which it did not or could not legally make. Government agencies can be held to determinations made in exercise of an authoritative power of decision because the statute does not demand any particular result. It does, however, demand a decision by the agency and it places limits on the authoritative character of the decision. It must be one made within jurisdiction. It would seem that to require the

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<sup>96</sup> *Supra* note 6.

<sup>97</sup> *Id.* at 232 (K.B.), 770 (All E.R.).

<sup>98</sup> *Supra* note 22.

<sup>99</sup> *Falmouth Boat Constr. v. Howell*, *supra* note 35.

<sup>100</sup> *Howell v. Falmouth Boat Constr.*, *supra* note 36, at 849 (A.C.) *per* Normand



agency to abide by an *ultra vires* decision would defeat the operation of the statute no less than to hold an agency having no authoritative power of decision to an earlier representation.

Generally the cases take that view of the matter. In *R. v. City of Toronto*, a developer applied for a building permit to construct an apartment hotel on lands zoned for other purposes.<sup>101</sup> The permit was refused. The developer applied for *mandamus* on the ground that he had previously been issued a building permit for the development in question (that permit having expired). The Ontario High Court found that the issuance of the first permit was invalid as contrary to the zoning by-law. As a result, it could form no basis for asserting an obligation on the municipality to issue a second permit.<sup>102</sup> The municipality had indeed determined that the development complied with the by-law, but that determination was erroneous and invalid. The Divisional Court in Ontario followed the same reasoning in *Re David Gallo Building Co. and City of Toronto*.<sup>103</sup> An application for a building permit was filed in September, 1972, but structural, electrical and mechanical drawings were not submitted as required by the building by-law. It was not until February, 1973, that the applicant was told the complete drawings would be required. In the meantime, the applicant had completed its purchase of the development property and the City had expressed its intention to pass a rezoning by-law that would not accommodate the applicant's proposal. In applying for *mandamus* to compel the issuance of a building permit, the developer argued that by specific waivers and consistent practice, the City had waived the requirements of the building by-law as to drawings, or had at least lulled the applicant into a false sense of security. The Court held, however, that the conduct of the City could not convert a deficient application into one worthy of a mandatory order for a permit.

Those who rely on legal rights must comply with the legal requirements. They cannot absolutely rely on the sensible indulgences often granted by public servants . . . . These may be discontinued as readily as they were instituted or maintained.<sup>104</sup>

These cases proceed on the principle that, if a public authority acts *ultra vires* in giving an assurance, it cannot be binding on that authority.<sup>105</sup> No estoppel can be created by an *ultra vires* determination.

But all the judges do not give up at that point in the search for a way to avoid inconsistency in the conduct of government business. *Wells v. Minister of Housing and Local Government* involved facts similar to those in the *Lever* case.<sup>106</sup> Developers received an enforcement notice from a planning authority that had previously ruled no planning permission was required for the development in question. The determination that no planning permission was required was apparently invalid because the formalities required by stat-

<sup>101</sup> [1971] 1 O.R. 451, 21 D.L.R. (3d) 541 (H.C.).

<sup>102</sup> The only real issue in the case was whether the issuance of the first permit was valid or invalid.

<sup>103</sup> [1973] 3 O.R. 892, 38 D.L.R. (3d) 536 (D.C.).

<sup>104</sup> *Id.* at 543 (D.L.R.) *per* Wright J.

<sup>105</sup> See de Smith, *supra* note 4, at 90 and cases cited at 89, nn. 44 and 46.

<sup>106</sup> *Supra* note 40.

ute for making it had not been followed. How could the Court of Appeal resist the contradictory government action without giving binding effect to an invalid determination? Lord Denning found two ways, although he did not clearly distinguish one from the other. The first was to say that there was no defect in procedure, or at least not one making the determination *ultra vires*.

I take the law to be that a defect in procedure can be cured, and an irregularity can be waived, even by a public authority, so as to render valid that which would otherwise be invalid.<sup>107</sup>

The second had broader implications. It was estoppel in classic form. The authority was estopped from denying the validity of its determination. It was simply not allowed to say in relation to its consistent practice in ruling on the need for planning permission that the practice was all wrong and its assurances of no effect.<sup>108</sup>

Here was a public body having and purporting to exercise an authoritative power of decision. It could not say to someone relying on that state of affairs that the power had not been exercised, that the decision had not been made. The authority was not estopped by an *ultra vires* determination; rather, it was estopped from saying that the determination was *ultra vires*. Given a valid decision, it was binding for the same reasons as were the decisions in *Cutt v. City of Langley* and *Re Violi*. The binding effect of the decision was not the result of estoppel.

The *Wells* case has, of course, great potential, but it is not likely to be realized unless Lord Denning's notion that an authority may be estopped from pleading *ultra vires* is secure. The truth is that there are countless decisions to the contrary.<sup>109</sup> Where the Minister of Agriculture exceeds his statutory authority in granting a lease, it is said that he is not estopped from denying the lease; to hold otherwise would enable the Minister by estoppel to do an act which is *ultra vires*.<sup>110</sup> Where a school board enters into a contract without following the required procedure in relation to conduct of meetings, it is said that no course of conduct otherwise sufficient to raise an estoppel can preclude a corporate body from setting up its own breach of statutory duty by way of defence to an action on contract.<sup>111</sup>

Yet in its most recent canvass of the issue, the Supreme Court of Canada has indicated that the rule is not nearly so absolute as these cases would suggest. In *Silver's Garage Ltd. v. Bridgewater*, certain snow removal equipment was supplied to and used by the town as a result of negotiations carried on for the town by two aldermen and two employees.<sup>112</sup> In an action for the price of the goods, the town successfully defended on the ground that there could be no contract without the authorization of the town council. Because

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<sup>107</sup> *Id.* at 1044 (All E.R.).

<sup>108</sup> Lord Denning really collapsed the two bases for his conclusion by saying that the public authority can be estopped from relying on technicalities.

<sup>109</sup> See de Smith, *supra* note 4, at 88-90.

<sup>110</sup> *Min. of Agriculture v. Matthews*, [1950] 1 K.B. 148, [1949] 2 All E.R. 724.

<sup>111</sup> *Waterman-Waterbury Mfg. Co. v. Slavanka School Dist.*, [1929] 2 D.L.R. 161, [1923] 1 W.W.R. 598, 23 Sask. L.R. 338 (C.A.).

<sup>112</sup> [1971] S.C.R. 577, 17 D.L.R. (3d) 1.

there was no collective action of the council related in any way to the purchase of the equipment, the case was said to be distinguishable from those in which contracts lacking only the formality of a seal or by-law were held to be enforceable if fully performed by the other contracting party. The Court said that the absence of statutory requirements is "not necessarily fatal" to the claim of the other party if there is a resolution of council authorizing the contract.<sup>113</sup>

Why should the existence of a resolution of council alter the result? The fact remains that the contract would not have been entered into in compliance with statutory requirements. The answer must be that the council enjoys an authoritative power of decision in the matter; it alone enjoys the power to create contractual rights against the municipality. And the body having that power may be estopped from denying that it has been exercised.<sup>114</sup> This was the answer given in *Biggs v. Township of Egremont*, a recent decision of the Ontario High Court upheld by the Ontario Court of Appeal.<sup>115</sup> Land was conveyed by the municipality on the authority of a resolution. The municipality received the consideration and approximately two years later attempted to renege on the contract. The Court found that the doctrine of estoppel was applicable to prevent the municipality from arguing the necessity of having a by-law. Lerner J. said:

Where the transaction is of a contractual nature and is an executed one, the municipality, having received the benefits coming to it under the contract, may be prevented from denying it is not [sic] bound by it although it was authorized by a simple resolution.<sup>116</sup>

If the municipality were not estopped in these circumstances, the other party would be "sorely prejudiced" by his reliance on the conduct of the council.<sup>117</sup>

Though Lerner J. might have limited the application of estoppel to the particular circumstance of executed contracts, there are earlier cases that apply the same principle to other aspects of municipal affairs. In *Bloomfield v. Municipality of Starland*, for example, the municipal council passed a resolution to keep open to the public a road passing through the applicant's land.<sup>118</sup> The applicant then sought compensation as provided for under municipal

<sup>113</sup> *Id.* at 9 (D.L.R.).

<sup>114</sup> In an earlier case, the Ontario High Court had emphasized that estoppel could not be invoked against a municipality without some action by the body having authoritative power of decision. Kingstone J. said in *Ottawa Electric Ry. v. City of Ottawa*, [1934] O.W.N. 265 at 268 (H.C.): "In order to create an estoppel where a municipal corporation is concerned, assuming that the law of estoppel does apply to a municipal corporation, something in the nature of a corporate act must be established. Here no such corporate act has been proved, and the acts of an official in the engineering department, without authority from the council itself, in no way binds the city or obligates it to the course of conduct pursued by that official."

<sup>115</sup> (1974), 5 O.R. (2d) 72, 49 D.L.R. (3d) 491 (H.C.), *aff'd* (1976), 12 O.R. (2d) 18, 67 D.L.R. (3d) 605 (C.A.).

<sup>116</sup> (1974), 5 O.R. (2d) 72 at 83, 49 D.L.R. (3d) 491 at 502, quoting from Rogers, 1 *Law of Canadian Municipal Corporations* (2d ed. Toronto: Carswell, 1971) at 421-22.

<sup>117</sup> See also *R. v. County of Perth* (1884), 6 O.R. 195 (C.P.).

<sup>118</sup> (1915), 21 D.L.R. 859, 31 W.L.R. 573 (Alta. S.C.), *aff'd* (1916), 25 D.L.R. 43, 32 W.L.R. 905, 9 W.W.R. 552 (C.A.).

legislation. The municipality argued that the power to keep open a road was one that could be exercised only by by-law. Stuart J. answered:

In my opinion, it is not now open to the council, having acted by resolution, having exercised the power even though informally, having forced Bloomfield to open the trail, to turn around now and object that they themselves had proceeded irregularly and that therefore the owner must be driven to an action. There is no reason in my opinion why the principal [*sic*] of estoppel should not be applied against them.<sup>119</sup>

In another case, a municipality that had initiated expropriation proceedings but refused to submit the compensation award for judicial confirmation was estopped from denying that notice of the expropriation had been properly given.<sup>120</sup> The *Wells* case itself has been followed and applied in a decision of the Chancery Division. In *Re L*, a local authority made an order vesting in itself parental rights over an infant.<sup>121</sup> The mother filed a notice of objection, the effect of which was to appeal the order to the Juvenile Court. Subsequently, the local authority made a new order, saying that the first order had not been properly made, but it told the mother that no further notice of objection would be required. The mother relied on that advice. The Court held that the corporation was estopped from alleging that no notice of objection had been received within the statutory time limit. It was estopped from relying on technicalities that related to the legal effect of its own order. It had represented its order to be one subject to appeal and it was estopped from saying otherwise.

I have shown earlier that an assurance given by a public authority will be binding if it involves an exercise of an authoritative power of decision. And it now appears, Lord Denning's notion being defensible, that a public authority may be estopped from denying that it has exercised a power of decision. It follows that a public authority may be bound to take executive action in accordance with a purported or apparent exercise of its decision-making power. Two points must be emphasized. First, estoppel does not require the public authority to do an *ultra vires* act.<sup>122</sup> Rather, it shields from the eyes of the court the invalidity of an act already done, and appropriate legal consequences are made to follow as if the act were valid. Second, estoppel is of no assistance in relation to the acts of a person without any authoritative power of decision. If legal consequences do not depend on his determinations, then the question simply does not arise whether they are valid or invalid. Thus, the principle applied in *Wells* would not alter the result in cases such

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<sup>119</sup> *Id.* at 860-61 (D.L.R.) (Alta. S.C.).

<sup>120</sup> *Scott v. City of Winnipeg* (1895), 11 Man. R. 84. As in the *Wells* case, the Manitoba Court of Queen's Bench found two bases for its decision. The first was that the slight departures from statute in giving the notice were irregularities only, that might be waived by the laches or subsequent acts of the municipality. The second was estoppel. See, however, *Gold Range Hotel Ltd. v. Plains-Western Gas and Electric Co.* (1964), 50 W.W.R. 654 (N.W.T.C.A.) holding that an informal resolution of the municipal council cannot give legal effect to an agreement even though both parties may have acted in accordance with its terms.

<sup>121</sup> [1971] 3 All E.R. 743 (Ch. D.).

<sup>122</sup> De Smith says, *supra* note 4, at 88, "a public body with limited powers cannot bind itself to act *ultra vires*."

as *Millett v. The Queen* or *Woon v. MNR*. The decision in *Silver's Garage Ltd. v. Bridgewater* is, I think, proof of this point.<sup>123</sup>

The full implications of the principle applied by Lord Denning in *Wells* have achieved little explicit recognition. An exceptional instance is Lord Denning's own judgment in *Lever*.<sup>124</sup> The developer had relied on an assurance that the proposed variations in construction were not material. There was no substantive basis for challenging that determination: it may have been in error, but an authority does not necessarily exceed its jurisdiction by erring on questions of law or fact. The problem was that the assurance had been given by the municipal planning officer and not by the public authority itself. The authority said that the representations of the officer should not be binding because it had delegated no authority to him. Lord Denning noted, however, that it had been the practice of the planning authority to allow its officers to advise applicants in respect of variations. By that conduct, it was estopped from saying that there had been no proper determination of the question decided by the officer.<sup>125</sup> That determination was binding and it undermined the power of the authority to issue an enforcement notice.

An earlier decision of the English Court of Appeal involved the same principle in a similar context. In *North Western Gas Board v. Manchester Corp.*, the statutory duty of the corporation depended on whether certain amounts paid to it by the board were "rates actually levied" on the board.<sup>126</sup> The corporation had designated the amounts as "rates" in its accounts to the board, but it later took the position that the amounts collected were not leviable as rates under the applicable rating legislation. In other words, the corporation was saying that it could not do what it had purported to do. Sellers L.J. held that the corporation was estopped from taking that position. The board had been prejudiced by the conduct of the corporation because it would not have paid the money unless it was paid as rates.

There are a few Canadian cases which show that an authority may be bound in the exercise of its powers by a determination not properly made or not made at all. In *School Trustees of Brockville v. Town Council of Brockville*, a case very much like *North Western Gas Board*, the town council denied that it had properly approved the estimates of the school board, saying that the estimates had not been laid before it as required by statute.<sup>127</sup> But the council had recognized the estimates by paying a portion of the amount requested, and Robinson C.J. held that this precluded the council from objecting that the estimates had not been properly laid before it. The council

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<sup>123</sup> The determinations of an official who has no authoritative power of decision cannot be relied on. See *R. v. Laister*, *supra* note 119, and cases cited in note 60 *supra*. The cause of some confusion on this point is that assurances given by a person without any authoritative power of decision may be described as *ultra vires*, and the court may say that no estoppel can be created by an *ultra vires* determination.

<sup>124</sup> *Supra* note 32.

<sup>125</sup> The officer had "ostensible authority," that is to say, authority arising out of a representation from the Corporation.

<sup>126</sup> *Supra* note 32.

<sup>127</sup> (1852), 9 U.C.Q.B. 302.

was obliged to perform its statutory duty to pay the estimates, as if they had been properly submitted and approved.

In *Madison Development Corp. v. Town of St. Albert*, a developer applied for a permit.<sup>128</sup> Three months passed and the development officer did not deliver any decision. The developer applied for an order of *mandamus* to compel the officer to issue a permit. It appeared that the application for a permit was deficient in certain respects. The proposed development complied in substance with the zoning and building by-law, but the application did not include various particulars required under the by-law. The issue arose whether the officer could rely on those deficiencies as a basis for refusing the application when they had not been brought to the attention of the developer at any time before the *mandamus* proceedings. By awarding *mandamus*, the Court held, in effect, that the officer could not assert his lack of power to issue the permit. It is true that the failure of the officer promptly to advise of the deficiencies was not the only factor which prevented his relying on them. There was in addition the assertion by the town that it was relying upon the failure of the applicant to avail himself of appeal procedures and not upon the deficiencies as the reason for opposing the *mandamus* order. Still, the judgment does suggest that the officer had in any event precluded himself from showing that the application did not comply with the by-law.<sup>129</sup> His silence was a representation that the application was in order, and this created a duty to issue the permit.

Estoppel emerges more clearly as the basis for decision in *Re George Herczeg Ltd. and City of Toronto*,<sup>130</sup> a case that may usefully be compared with *Re David Gallo*. The City defended its refusal of a building permit on the ground, *inter alia*, that the application was deficient under the zoning by-law because it included material relating only to excavation. It appeared, however, that the City had developed a practice of issuing a building permit in three stages: excavation, foundation and superstructure. This created an estoppel which the Court expressed as follows:

I do not think it appropriate for the city to now resist mandamus by saying to the applicants . . . you should have done something that was not the agreed and accepted mode of procedure which was adopted and followed by the city and by builders.<sup>131</sup>

The City could not say that what it had always done was not proper.<sup>132</sup> It might have been argued in the *George Herczeg* case that the City could not

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<sup>128</sup> [1975] 6 W.W.R. 345 (Alta. S.C.).

<sup>129</sup> McDonald J. emphasized that the developer was not advised of the deficiencies until after the *mandamus* proceedings had commenced.

<sup>130</sup> [1972] 2 O.R. 561, 26 D.L.R. (3d) 165 (H.C.).

<sup>131</sup> *Id.* at 168 (D.L.R.) *per* Galligan J.

<sup>132</sup> To the same effect is the unreported decision of Cowan C.J.T.D. in *Re Governors of Dalhousie College & University* (1974), upheld by the Nova Scotia Court of Appeal (1975), 53 D.L.R. (3d) 610, 9 N.S.R. (2d) 645. At trial his Lordship said at 24-26:

In my opinion, it would be unjust to permit the city now to take the stand that it had not been supplied with detailed specifications and scale drawings, when it had consciously and deliberately, and in accordance with practices followed for some seven years, induced applicants such as the University to omit to file such specifications and scale drawings at the [preliminary] stage . . .

be bound by what had been done in other cases, properly or improperly, because that would be to prevent it from dealing with each case on its individual merits. The developer was not relying on a purported exercise of power in relation to his case.<sup>133</sup> This point was taken up by Dubinsky J. in *Chater v. City of Dartmouth*, involving a similar fact situation.<sup>134</sup> He held that the developer could not rely on an unlawful practice deliberately followed by the municipality in the absence of some representation that the usual practice would be followed in his case.<sup>135</sup>

Finally, there is the decision in *Re Smith and Municipality of Vanier*, already considered.<sup>136</sup> Pennell J. professed to be enforcing a requirement of good faith in the exercise of statutory powers, and he did not use the language of estoppel. Still, he could not order the municipality to issue a licence unless he was satisfied that the municipality had exercised its discretion in the applicant's favour. By ordering *mandamus*, he was treating the municipality as having made precisely that decision which its conduct in the matter gave the appearance of having been made. Bad faith was an appropriate label under which to tailor the administrative action of the municipality to its prior decisions. But it is estoppel that permits the court to find a decision in the conduct of the public authority. In the much earlier case of *Township of Pembroke v. Canada Central Railway Co.*, the Ontario High Court used the principle for that purpose.<sup>137</sup> A municipality whose council had passed resolutions requiring the railway company to fill up ditches and put down proper crossings later took the position that it had not given its permission to construction of the railway as required by statute. It was held that something "more than mere acquiescence" was involved, and in these circumstances the municipality was not permitted to say that the consent required by the legislation had not been given.<sup>138</sup>

What distinguishes *Re Smith* from *Township of Pembroke* and gives it the appearance of being revolutionary is that the former case involves a restriction on the freedom of action of the municipality in exercising a statutory

<sup>133</sup> See text accompanying and following note 56, *supra*.

<sup>134</sup> (1975), 62 D.L.R. (3d) 122, 20 N.S.R. (2d) 34 (T.D.).

<sup>135</sup> The *Dalhousie College* case, *supra* note 132, was distinguished on the ground that "there . . . the city's officials by their discussions with the university gave the university every reason to believe that as to the university, the usual practice was being followed." *Id.* at 140 (D.L.R.) *per* Dubinsky J.

<sup>136</sup> *Supra* note 86.

<sup>137</sup> (1882), 3 O.R. 503 (H.C.).

<sup>138</sup> *Id.* at 509-10. See also *Queen Victoria Niagara Falls Park Comm'rs. v. International Ry Co.*, *supra* note 6. The Commissioners entered into an agreement permitting the company to operate a railway within the park. For many years the railway sold souvenirs as part of its operation, and this was known to the Commissioners. The Ontario Supreme Court, Appellate Division, held that the Commissioners were estopped from later taking the position that the sale of souvenirs was not authorized by the agreement. Grant J.A. at 769 (D.L.R.) said, "In all this, not only was there no notice or warning given by the plaintiffs to the defendants that the sale of souvenirs, etc., was objected to, or would not be allowed to continue, but, on the contrary, I think it is a fair and just inference to be drawn from the circumstances, that the defendants not only themselves expected, but were expected by the plaintiffs, to continue the business of selling souvenirs . . ."

power. It involves estoppel as well and seems, therefore, to violate the rule that a public authority may not be estopped from exercising its statutory power. But this view of the matter fails to recognize that *Re Smith* involves not an exception to one established principle, but two established principles working in combination. Those principles are, first, that an authority may be estopped from saying that it has not made a particular decision, and, second, that an authority may be bound to act in accordance with its previous decisions.<sup>139</sup> Taken together they do not mean that the authority is estopped from exercising its power.

## V. CONCLUSION

There are many questions still to be resolved. I would single out two as being of particular importance.

In applying the principle that a government agency may be estopped from pleading *ultra vires*, is a line to be drawn somewhere on the basis of the nature of the jurisdictional defect? In most of the cases I have examined here the defect in question was minor, technical or procedural.<sup>140</sup> The agency had power to do what it was taken to have done.<sup>141</sup> The *North Western Gas Board* case is perhaps exceptional because the public authority wanted to say that the applicable legislation simply did not authorize it to levy as rates the amounts collected. There was no apparent way in which the authority might have acquired jurisdiction by proceeding differently. The Canadian cases that say a municipal corporation may be estopped from pleading *ultra vires* insist that the action taken be within the "general competence" of the municipality.<sup>142</sup> It should not escape notice, however, that if estoppel is limited to cases in which the public authority had power to do what was done improperly, then the concept of estoppel is not really needed to ensure that public authorities behave consistently. The decision or act which is described as *ultra vires* can be characterized simply as a promise by the authority to implement by appro-

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<sup>139</sup> This assumes, of course, an authoritative power of decision and reliance on the conduct of the public authority.

<sup>140</sup> In at least two cases, *Wells v. Min. of Hous. and Local Gov't*, *supra* note 40, and *Scott v. City of Winnipeg*, *supra* note 120, the departures from statute were characterized as irregularities only, that might be waived by the authority. In *Lever (Finance) Ltd. v. Westminster Corp.*, *supra* note 32, Sachs L.J. approved of Lord Denning's judgment in the *Wells* case only to the extent that it recognized a waiver of procedural irregularities, rendering valid that which would otherwise be invalid.

<sup>141</sup> Evans, *Delegation and Estoppel in Administrative Law*, *supra* note 34, at 337, notes that the scope of the principle applied by Lord Denning in *Lever* is not altogether clear. It is not clear whether estoppel operated irrespective of any statutory power in the corporation to delegate its functions to the planning officer. In *Grevas v. The Queen* (1957), 10 D.L.R. (2d) 500, 23 W.W.R. 577, the Supreme Court of British Columbia held that the Minister of Mines could not be estopped from saying that certificates of work issued by his department were ineffective, because they were obtained without proper compliance with the statute. Here, however, the statute expressly conferred power on the Minister to take certain action upon receiving a complaint that certificates had been improperly or wrongfully obtained.

<sup>142</sup> See Rogers, 2 *The Law of Canadian Municipal Corporations*, *supra* note 116, at 1003, and compare *Jamieson v. City of Fredericton* (1851), 7 N.B.R. 128 (S.C.) and *Rayonier B.C. Ltd. v. City of New Westminster* (1961), 30 D.L.R. (2d) 446, 36 W.W.R. 433 (B.C.C.A.) with *Township of Pembroke v. Canada Central Ry. Co.*, *supra* note 137.



appropriate executive action its substantive determination of the question. It simply does not matter that the act or decision is *ultra vires* on procedural grounds. It is nonetheless a determination in the individual's favour and should require implementation by proper executive action no less than the determinations in cases such as *Cutt v. City of Langley* and *Re Violi*.<sup>143</sup> There is good reason to prefer this philosophic basis over estoppel. It has been suggested, quite properly I think, that no effect should be given to an *ultra vires* act where there is some third party adversely affected by it.<sup>144</sup> The private law right arising under the doctrine of estoppel should not override the public law right arising under the concept of jurisdiction. This conflict is avoided entirely if the *ultra vires* act or decision is characterized as an exercise of power that must be implemented by the appropriate executive action. Clearly, this analytical device will not accommodate cases in which the authority asserts substantive *ultra vires* on the ground, for example, that it has erred on a question that is preliminary or collateral to its jurisdiction. These are questions to which its authoritative power of decision does not extend. In deciding whether the authority should nonetheless be estopped from pleading *ultra vires*, I believe the question to be answered is whether, in relation to questions of that sort, the government agency stands in any different position from the agency having no authoritative power of decision at all.<sup>145</sup> If estoppel is made generally applicable to jurisdictional defects, it may not be essential even that the agency has purported to decide in the individual's favour the questions of law or fact upon which the limits of its jurisdiction depend. The *George Herczeg* case applies estoppel to unlawful practices deliberately followed.

The second question relates to the role played by detrimental reliance as a necessary element in holding the government to its undertakings. In *Norfolk County Council v. Secretary of State*, the court refused to hold that the council was estopped by the action of its planning officer in mistakenly issuing a development permit because the developer had suffered no detriment.<sup>146</sup> In a Canadian case, it was held that an experienced developer could not claim to have been misled by the representations of a planning director.<sup>147</sup> These cases suggest that reasonable reliance and consequent damage are

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<sup>143</sup> The case which comes closest to proceeding on this analytical basis is *British Columbia Hop Co. v. District of Kent*, *supra* note 78. The council had agreed to close a road but it passed no bylaw for that purpose. Macdonald J. said at 175 (D.L.R.) that "the powers of the municipality could have been exercised to effect the intention of the parties," and he held that the intention should be implemented by the council of the municipality.

<sup>144</sup> Gould, *Note* (1971), 87 L.Q. Rev. 15 at 17-18.

<sup>145</sup> There is this difference. In the absence of any authoritative power of decision in a government agency, the court has original jurisdiction in relation to any questions of law or fact arising under the statute. But where questions of law or fact are preliminary or collateral to the jurisdiction of any agency having authoritative power of decision, the court has supervisory jurisdiction only and can make no original declaration of right. The line, however, between original and supervisory jurisdiction is not distinct. See Warren, *The Declaratory Judgment: Reviewing Administrative Action* (1966), 44 Can. Rev. 610 at 631-41.

<sup>146</sup> [1973] 3 All E.R. 673, [1973] 1 W.L.R. 1400.

<sup>147</sup> *Re Fairmeadow Developments Ltd.*, [1973] 3 O.R. 144, 36 D.L.R. (3d) 168 (D.C.).

essential elements. Yet de Smith notes that in the *Liverpool Corporation* case, there was no detrimental reliance on the assurance that persons affected would be heard before a decision was taken.<sup>148</sup> And in *Re Smith and The Queen*, Berger J. did not find that the accused had relied to his detriment on the promise that he would not be prosecuted.<sup>149</sup> It is impossible to reconcile the cases on the basis that detrimental reliance is required only where the authority is to be estopped from pleading *ultra vires*. There are cases treating reliance as essential where excess of jurisdiction is not pleaded,<sup>150</sup> and cases treating reliance as unnecessary where it is.<sup>151</sup>

I have not answered these questions. It is hoped, however, that they will not be obscured by the proposition that the Crown cannot be estopped. As Mr. Justice Berger puts it, the ordinary man is entitled to expect that the Crown will keep its word.

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<sup>148</sup> *Supra* note 4, at 91.

<sup>149</sup> *Supra* note 85.

<sup>150</sup> In *Western Dominion Coal Mines v. The King*, [1946] Ex. C.R. 387, [1946] 4 D.L.R. 270, the company claimed a subsidy on the basis that the Emergency Coal Production Board had induced it to believe that it had been found entitled to the subsidy provided for by Order in Council. The Exchequer Court held that the company could not succeed on the ground of estoppel because the company had not changed its position by reason of any statement or representation by or on behalf of the Crown. In both *Re Loblaws Ltd.*, *supra* note 63, and *Re Multi-Malls Inc.*, *supra* note 73, the developers relied to their detriment on the assurances given.

<sup>151</sup> In *School Trustees of Brockville v. Town Council of Brockville*, *supra* note 127, there was no finding of detrimental reliance. Compare *Scott v. City of Winnipeg*, *supra* note 120, at 93 *per* Dubuc J., in which the City was estopped from denying the validity of its notice of expropriation because when the notice was given "the plaintiff's right to dispose of his land, or to do anything he pleased with it was gone."